1964

Orem City v. Dee Pyne : Defendant-Brief of Respondent

Utah Supreme Court

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Frank H. Butterfield; Attorney for Defendant-Respondent;

In the Supreme Court of the State of Utah

OREM CITY, a Municipal Corporation,
Plaintiff-Appellant,

vs.

DEE PYNE,
Defendant-Respondent.

CASE NO. 10211

DEFENDANT-RESPONDENT'S BRIEF

Appeal from the Judgment of the Fourth District Court
for Utah County, Utah,
Honorable Maurice Harding, Judge

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STATEMENT OF THE NATURE OF THE CASE

Defendant-Respondent was charged with the crime of a misdemeanor in the Orem City Court for failing to pay a license tax to Orem City for a retail sales used automobile business operated by him in Orem, Utah.

DISPOSITION IN LOWER COURT

In the Orem City Court the Defendant-Respondent was convicted and thereafter appealed his conviction to the Fourth Judicial District Court in and for Utah County, claiming that the license ordinance under whose perview he was convicted was void as to him.

The Defendant-Respondent being entitled to a trial de novo entered a plea of "Not Guilty", but stipulated that during the time since the ordinance had purportedly been in effect he had conducted a used car business within Orem City and made sales of used cars which were subject to the Utah State Retail Sales Tax and had not paid any Orem City license tax.

Orem City Ordinance No. 26, passed by the City Council of Orem City, May 22, 1961, and published in the Orem-Geneva Times on June 1, 1961, a newspaper of general circulation in Orem City, was introduced in evidence by stipulation of the parties. The Defendant-Respondent moved the Court for dismissal of the complaint solely on the ground that the ordinance was invalid in imposing any tax on the Defendant's used car business on the basis that the ordinance was unreasonable, arbitrary, and discriminatory in its application to the Defendant-Respondent's business.

The Fourth Judicial District Court of Utah, in and for Utah County, on date of August 3, 1964, on the grounds that the ordinance was unreasonable, arbitrary, and discriminatory granted the motion for dismissal and entered an Order of Dismissal in accordance therewith.

RELIEF SOUGHT ON APPEAL

The Defendant-Respondent in this appeal requests the Court for an Order affirming the Order of Dismissal of the Fourth District Court and further that it hold and declare Orem City Ordinance No. 26 null, void, and unconstitutional as it applies to Defendant-Respondent.

STATEMENT OF FACTS

There was no record of any evidence other than the stipulation by the parties that the Defendant-Respondent during the time since the Ordinance purportedly went into effect conducted a retail used car sales business within Orem City and made sales subject to the sales tax imposed by the State of Utah on retail sales, and had not paid any Orem City license tax.

Orem City Ordinance No. 26 was introduced in evidence by stipulation of the parties; Section 3 of said ordinance imposes a license fee as follows:

* * * *

> SECTION #3. Any individual, firm, co-partnership, joint venture, corporation, estate or trust or any group or combination acting as a unit, the plural as well as the singular, engaged in business of manufacturing of any tangible, personal property and selling the same at retail in Orem City; or of selling any tangible personal property at either retail or wholessale, or both in Orem City shall pay to Orem City an annual license fee of 1/10 of 1% of the gross sales made, that are also subject to the State of Utah Sales Tax, but the minimum license fee shall be $6.25 per quarter and the maximum license fee shall be $75.00 per quarter payable quarterly . . . . * * * *

SECTION #1 of this same Ordinance, however, lists 201 purported businesses subject to this ordinance also and excludes the operation of Section #3 upon some of them by establishing a flat rate of $25.00 per annum despite the fact that they too sell tangible personal property at either retail or wholsale, such sales being also subject to

the State of Utah retail sales tax where the sale is in effect on a retail basis.

Section #1 does not name specifically the Defendant-Respondent's type of business and if his business is covered at all, it is by Section #3.

RESPONDENT'S POINT

THE COURT RULED CORRECTLY THAT THE ORDINANCE WAS UNREASONABLE, ARBITRARY, AND DISCRIMINATORY IN ITS APPLICATION TO DEFENDANT-RESPONDENT'S BUSINESS IN GRANTING ITS ORDER OF DISMISSAL AND THEREFORE SHOULD BE AFFIRMED.

ARGUMENT

This Defendant-Respondent does not dispute Orem City's authority to impose a license tax on businesses within its corporate limits to raise revenue. Section 10-8-80 of the Utah Code Annotated, 1953 confers such rights on Cities and Towns in Utah, but with the qualification . . .

> "All such license fees and taxes shall be unifrom in respect to the class upon which they are imposed."

Pursuant to this Statute, the City of Orem enacted its Ordinance No. 26, providing in Section 3 a tax of 1/10 of 1% on the gross sales of businesses in Orem City engaged in selling tangible personal property where such sales were subject to the Utah State Retail Sales Tax, with a minimum of $6.25 per quarter year and a maximum of $75.00 for the same period.

If the Defendant-Respondent's business is covered at all, it is covered by this general section and not by any other specific provision of the ordinance. Further, if Orem City's Ordinance No. 26 contained only this general provision for the licensing of anyone engaged in selling tangible personal property subject to Utah State Retail Sales Tax, and no more, it would certainly comply with the statutory requirement of uniformity set forth in Section 10-8-80, Utah Code Annotated, 1953. Unfortunately, however, it sets about to enumerate more than 200 specific businesses and professions, disregarding the requirement of uniformity and arbitrarily levying a license fee for some on the basis of Section 3, and others on a straight annual fee of $25.00 regardless of their volume of gross sales, even though such sales are subject to the Utah State Retail Sales Tax law.

The Defendant-Respondent is aware and admits that the law presumes that an ordinance is valid until the contrary is shown. However, city licensing ordinances enacted for tax purposes must be strictly construed, and in cases of reasonable doubt, the construction should be against the government. **Miller v. Standard Nut Margerine Co.,** 284 US 498, 52 S Ct 260, 263, 76 L Ed 422. **Appeal of School District of City of Allentown** (1952) 370 Pa 161, 87 A. 2D 480.

The principal claim of the Defendant-Respondent is that the ordinance in question is discriminatory, arbitrary and unreasonable and contravenes the Fourteenth Amendment of the Constitution of the United States of America, depriving this person of his property, without due process of law and further denying him the equal protection of

the laws which is also guaranteed him by Article 1, Section 2 of the Utah State Constitution:

> "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit . . . ."

In **Matthews v. Jensen,** 21 Utah 207, 61 P 303, at page 227 of the Utah Reports, the Supreme Court of Utah said:

> "Neither the constitution nor the statute authorizes . . . . ordinances . . . . to tax citizens arbitrarily and unustly, by license which confers no privilege that was not previously enjoyed, and which has no view to regulation. Unjust and illegal discrimination between persons, in taxation, and the denial of equal justice, are within the prohibitions of the constitution of this state, and of the United States."

Further the Court said:

> "The law abhors inequality and lack of uniformity in Taxation whether the burden be imposed by license or by levy and assessment."

As to what constitutes illegal and unjust discrimination in taxation, our Supreme Court of Utah has held in the case of **Slater v. Salt Lake City,** 115 Utah 476, 206 P 2d 153:

> "Discrimination is the essence of classification and does violence to the constitution only when the basis upon which it is founded is unreasonable. In fixing the limits of the class, the legislative body has a wide discretion and this court may not concern itself with the wisdom or policy of the law. Our function is to determine whether an enactment operates equally upon all persons similarly situated. If it does then the dis-

crimination is within permissible legislative limits. If it does not, then the discrimination would be without reasonable basis and the act does not meet the test of constitutionality."

Continuing, the Court declared:

> "This Court has repeatedly passed on municipal ordinances and has invalidated them when there has been unreasonable discrimination. Just so long as City Commissioners insist on writing unwarranted exemptions into ordinances must the enactment fail. Equality of treatment of classes similarly situated must be maintained. And even though an exemption granted may be temporary, a preference extended for a short period of time undermines the foundation upon which equal protection of the law is premised."

From this case, which was also the precedent for deciding the Davis case, **Davis vs. Ogden City,** 215 Pac 2d, 616, we then have the test that Utah has adopted to establish the validity of Ordinances or to strike them down:

Does the enactment in question operate equally upon all persons similarly situated?

In the Davis case the Court upheld Ogden City's ordinance imposing a license fee on every business and profession in Ogden, Utah, based on a percentage of gross receipts and rightfully so since its application was uniform for all in Ogden engaged in business, whether it be of selling goods or rendering services professionally or otherwise so long as the person was in business or self-employed.

Here then we have reached the issue which divides the respective parties to this action. Just what is meant by "Persons similarly situated?" The Plaintiff-Appellant

contends that it means persons selling the same identical product or engaged in the same identical service. All used car dealers, all book stores, all soft drink sales agencies, all lumber yards and so on ad infinitum would be persons similarly situated and them alone. The Appellant refuses to accept that the seller of used cars is similarly situated as the seller of heavy farm machinery; that the seller of books is similarly situated as the seller of magazines; that the seller of hot dogs is similarly situated as the seller of ice cream. Appellant contends that the city can establish a separate class for every seller of a known product, and that when new products come upon the market, using the same logic, there will have to be a new class established for that particular seller of that product. This type of classification is certainly unreasonable.

It is the position of the Defendant-Respondent that the seller of used cars is in fact in every sense of the term (except for product) in a similar situation as the seller of appliances, meat, farm implements, oriental goods, auto parts, magazines and soft water machines. All of the aforementioned products when sold are amenable to the Utah State Retail Sales Tax law, and are in every sense of the term tangible property, and sellers of these products should be taxed by Orem City on the same basis as provided in Section 3 of the ordinance in question.

Plaintiff-Appellant contends that Defendant-Respondent should pay a license tax of up to $300.00 per year as an annual license tax to do business in Orem City. However, the sellers of the other products mentioned in the preceding paragraph, because they are put in a class, all by themselves, should only be required to pay an annual license fee

or tax of $25.00 regardless of the amount of gross sales they make of their particular product during the calendar year. And the only justification given for this action is that the Orem City has or is supposed to have an unquestioned right of classification of business in its territorial jurisdiction, and that once the iron clad classification has been made, there is no opportunity to even consult with the city officials if a particular business man is not in accord with this rigid classification. The ordinance in question has no provision for any adjustment, hearing, or even interview with any city official ergarding the arbitrary classification and establishment of tax.

Mr. Justice Wolf, in concurring in the Slater case, above cited, declared:

> "Always the classification must be reviewed and viewed in the light of the purposes of the legislation. And if we can conceive of any exigency or exigencies which could reasonably be met by the prohibition we must assume that the legislation was passed for those purposes and test the constitutionality of the act accordingly."

Now the purpose of this ordinance is to raise revenue only, and hence the classification must be viewed or revieewd in light of this purpose and not to prohibit the commencement or carrying on of a particular business as is the case in most of the cases cited in Plaintiff-Appellant's brief.

In the case of **Bradley vs. Richmond,** 227 US 477, 57 L ed. 603, 33 SC p 318; **Sedalia ex rel. Bauman vs. Standard Oil Company,** 66 Fed. 2d 757, 95 ALR 1514; and **City of St. Charles vs. Schulte,** 305 Mo. 124, 264 SW 654, all cited

by Plaintiff-Appellant, the classes established by the various legislative bodies in these cases were definite; standards were established which clearly distinguished one class from another. However the purpose of these ordinances were to regulate banking, the sale of gasoline, and soft drinks. Orem City Ordinance No. 26, however, seeks not to regulate anything. Its only purpose is to raise revenue, and the only basis of classification used is the difference of product sold.

The cases cited in the preceding paragraph are the basis of the legal text of Classification contained in American Jurisprudence Volume 38, page 32, under the title of Municipal Corporations, section 343 reads:

> "The general rule, so far as classification of business for the purpose of municipal license or occupation taxation is concerned is that trades, occupations, professions and privileges may be classified for the purpose of license or occupation taxation, and different licenses may be imposed upon the various classes, provided the classification is reasonable".

Defendant-Respondent submits that a classification based on the kind of product sold only is certainly unreasonable.

To establish by Section 3 of the ordinance a reasonable classification of businesses generally for taxation and fix a tax rate therefor based on gross sales with certain minimum and maximum amounts, and by another section of the same ordinance exclude from the operation of Section 3, certain businesses naturally falling within its classification, and apply to such excluded businesses a tax rate on a flat annual basis that can not possibly be more than

the minimum for the unexcluded businesses is unreasonable, arbitrary, and discriminatory. Such exclusion assures to the excluded businesses a concession not accorded to other businesses similarly situated.

This is in keeping with the decision of the Utah Supreme Court in the case of **State vs. Mason,** 78 Pac 2d, 920 in upholding a Utah State Statute requiring purchasers of farm products from farmers, other than for cash, to obtain a Utah State License in order to protect the farmers from selling their crops to someone not financially responsible.

> "A denial of the law's equal protection presupposes an unreasonable discrimination between those included and those excluded from the act whether the act confers a privilege or a right or imposes a duty or an obligation . . . .
>
> A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purpose to be accomplished by the act . . . .
>
> The objects and purposes of a law present the touch stones for determining the proper and improper classification." . . . .
>
> "It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional."

Certainly, those businesses specifically classified by themselves by the Orem ordinance in section 1 of the enactment and exempted from the operation of the levy of 1/10 of 1% of the gross sales as provided in Section 3, and given the flat $25.00 tax per annum render this said Ordinance No. 26 of Orem arbitrary and unconstitutional.

This same holding is supported by another Utah Case, that of **Broadbent vs. Gibson,** 140 Pac 2d, 939.

Plaintiff-Appellant admits, "Fundamentally, the Orem City ordinance has two levys"—one at the rate of $25.00 and one at one-tenth of 1% of the gross sales. Now how can there be an equal application of the law here to persons similarly situated when there is a dual standard of levy and it rests with the City Council to say what or which of the levies should be applied to a certain person or business placed in a fixed class also at the whim of the council? Especially where those on a percentage of gross sales levy must pay up to $300.00 or twelve times the amount of the $25.00 class.

Finally, and in referenc to Orem's dual standard of levy it must be remembered that the Statute, Section 10-8-80 of the Uah Code Annotated, 1953, requires that the license fees and taxes shall be "Uniform" in respect to the class upon which they are imposed. The term Uniform means literally "one form" which is applicable to all concerned; yet the Orem ordinance has admittedly not one but two forms of levy which are applied to persons selling tangible personal property subject to the Utah State Retail Sales Tax law.

The Defendant-Respondent, in answering Plaintiff-Appellant's argument that it is extremely difficult, if not im-

possible, to devise a tax system which is equitable to all, respectfully calls the Court's attention to the ordinance of Ogden City which was reviewed in the Davis case and which was upheld by this Court because it was uniform and operated equally upon all persons similarly situated, based on a percentage of gross receipts. Salt Lake City has adopted the other avenue of a base of $25.00 per business plus $2.00 per employee, which also is uniform and complies with the Statute. Orem City could adopt either of these two plans. It cannot have both and arbitrarily apply first one and then the other to merchants on a hit and miss checker board fashion and still comply with the statute.

CONCLUSION

The Defendant-Respondent respectfully contends that the lower Court's Order dismissing the complaint against him by the Plaintiff-Appellant and holding the Orem Ordinance No. 26 void as it applied to him was correct, and should be affirmed by this Court.

Respectfully submitted,

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